No. 93-425

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In The

Supreme Court of the United States

October Term, 1993

MUTUAL OF OMAHA LIFE INSURANCE COMPANY,

Petitioner,

v.

MARY P. DAHL-EIMERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

A. The Circumstances Described in Plaintiff's Recent Affidavit Do Not Cure the Absence of a Justiciable Controversy Before the Eleventh Circuit.

In the opposing brief, Plaintiff refers to an affidavit executed by Plaintiff and filed with the District Court on September 14, 1993, describing recent developments in Plaintiff's physical condition. Mutual had not received the affidavit as of the filing of its Petition for Certiorari, and thus could not comment upon its contents in the Petition. The affidavit states that Plaintiff was diagnosed in August, 1993, with active cancer in her liver, and has been placed upon a standard dose chemotherapy regimen utilizing a drug called Taxol. Plaintiff expects the Taxol therapy to continue for "three to five months, depending on my response". After completion of Taxol, Plaintiff states that it is her intention to seek HDC-ABMT "at a cancer center in the United States."

The recent change in Plaintiff's condition is not relevant to the issue raised by the Petition – whether the case had become moot before the Eleventh Circuit at the time the Eleventh Circuit issued its opinion. At issue here is whether there was a justiciable controversy concerning Plaintiff's request for a preliminary injunction before the Eleventh Circuit, not whether there may or may not be a justiciable controversy now on the merits. Even if the new facts set forth in the affidavit were sufficient to supply a meaningful factual framework to evaluate Plaintiff's claim, which they are not, Plaintiff makes no

contention that such a framework existed at the time of the Eleventh Circuit's decision.

Moreover, the recent change in Plaintiff's condition does not supply the factual predicate necessary to cure the mootness of Plaintiff's request for a preliminary injunction. The affidavit does not say that Plaintiff has a present desire to undergo HDC-ABMT under the I.C.E. protocol at Moffitt. Absent such an intent, the request for a preliminary injunction remains moot. In fact, the district court has so held in an order entered October 15, 1993, denying Plaintiff's Motion for Rehearing of the district court's order dismissing the case on the merits for lack of a justiciable controversy. In the order, attached to this brief in Appendix A, the district court explained that the new facts set forth in the Plaintiff's affidavit do not resolve the numerous contingencies present in the case which preclude the existence of a justiciable controversy on the merits of Plaintiff's claim. *Id.* at 2. The same conclusion holds true with respect to Plaintiff's request for a preliminary injunction unless and until Plaintiff's medical condition requires immediate injunctive relief to permit Plaintiff's participation in the I.C.E. protocol at Moffitt – a situation not demonstrated by the affidavit.

The key facts which rendered moot the motion for a preliminary injunction remain undisputed. Plaintiff's condition improved such that HDC-ABMT was no longer medically appropriate on or about February 10, 1993. From that point forward, preliminary injunctive relief compelling Mutual to pay for Plaintiff's participation in the I.C.E. protocol at Moffitt could no longer have been of benefit to Plaintiff, and the Court of Appeals was

deprived of jurisdiction over the injunctive aspect of the case.[1]

B. The Various Claims Previously Pending in the District Court Did Not Provide a Basis for Jurisdiction in the Eleventh Circuit.

Much of Plaintiff's argument is centered upon a fundamental misunderstanding of the issues which were on appeal before the Eleventh Circuit, and those which remained pending in the district court. The only issue on appeal, and the only issue ruled upon by the district court in advance of the appeal, was the propriety of a preliminary injunction. Plaintiff's remaining claims for a permanent injunction, declaratory relief and damages remained pending in the district court without ruling of any kind, until the recent dismissal for lack of a justiciable controversy. Plaintiff's suggestion that the pending district court claims somehow provided a basis for the Eleventh Circuit to rule upon a moot request for a preliminary injunction is simply wrong. The case law upon which Plaintiff relies in support of that assertion stands

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[1] Moreover, Plaintiff's apparent relapse is not sufficient to support application of the exception to the mootness doctrine for cases capable of repetition yet evading review. The requirements of that exception demand an analysis of the inherent characteristics of the dispute, not of the unique events of any particular case. *See Honig v. Doe*, 484 U.S. 305, 308 n.6 (1988). Obviously, the progress of Plaintiff's medical condition is unique to Plaintiff. Circumstances which universally characterize this type of controversy do not routinely moot the controversy before litigation is completed. Plaintiff's affidavit does not demonstrate otherwise.

only for the proposition that a court of appeals may, in limited circumstances, reach the merits in a live, justiciable appeal of an order on a preliminary injunction. Those cases do not stand for the proposition that a court of appeals may do so when the injunctive aspect of the case has become moot.

For example, in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), the court evaluated the justiciability of an appeal from an order denying a motion for preliminary injunction *and* dismissing the complaint on the merits, including a request for declaratory relief. The Court held that even if the injunctive aspect of the case had become moot, the appeal from the dismissal on the merits of Plaintiff's claim for declaratory relief could be addressed on appeal. However, the Court concluded that the case had become moot with respect to the request for injunctive relief.

> The respondent union invites us to conclude that this controversy between the petitioners and the State became moot. . . . That conclusion however, is appropriate with respect to only one aspect of the lawsuit, that is, the request for injunctive relief. . . .

Id. at 121.

In *McCorkle*, the Court retained jurisdiction over the declaratory aspect of the case only because the district court had reached a decision on the merits of that issue, and that decision was before the Court on appeal. Here, in contrast, the only issue on appeal, and the only basis upon which the jurisdiction of the Eleventh Circuit could have been exercised, was the motion for a preliminary injunction. That aspect of the case having become moot,

there was no basis upon which the Eleventh Circuit could have continued to exercise its jurisdiction.

Likewise, in *Fire Fighters Local Union No.1784 v. Stotts*, 467 U.S. 561 (1984), the court held that the injunctive aspect of the appeal remained justiciable because of its continuing effect upon the activities of the parties. *Id.* at 569. The court distinguished *University of Texas v. Camenisch*, 451 U.S. 390 (1981), on that basis, explaining that when the injunction expired in *Camenisch*, it carried no further impact upon the activities of the parties. *Id.* at 572 n.6. Here, in contrast, Plaintiff's medical circumstances no longer require an order compelling Mutual to pay for her receipt of HDC-ABMT under the I.C.E. protocol at Moffitt. The requested injunction no longer carries with it any practical impact upon the activities of either Plaintiff or of Mutual.

Plaintiff suggests that so long as there remained pending in the district court claims upon which a ruling by the court of appeals might be helpful, the court of appeals retained jurisdiction to render such advice, regardless of the presence of a justiciable appeal. That position, one apparently adopted by the Eleventh Circuit, is incorrect and conflicts directly with well established decisions of this Court.

C. Vacatur of Prior Opinions is Required.

Plaintiff suggests that the circumstances of this case do not warrant the vacation of prior opinions. Plaintiff does not dispute that such is the established practice of both this Court and virtually all courts of appeals, but

suggests that the purpose underlying that rule, to avoid the collateral effect of orders not fully subject to the appellate process, is not furthered in this case. In fact, that purpose is specifically furthered in these circumstances.

The Eleventh Circuit lost its jurisdictional ability to consider this case in February, 1993, when Plaintiff's medical circumstances changed such that HDC-ABMT under the I.C.E. protocol at Moffitt was no longer appropriate. At that point, the dispute was no longer capable of further consideration by the court, and Mutual immediately lost its ability to pursue the appeal to its ultimate conclusion. It was only because Mutual did not become aware of the change of circumstances until after the decision of the Eleventh Circuit had been rendered that the facts establishing mootness could not have been brought earlier to the Eleventh Circuit's attention. Even with the delay in discovery of those facts, Mutual was, at a minimum, deprived of an opportunity to seek rehearing on the merits before the Eleventh Circuit and to petition this Court for certiorari on the merits. That Mutual chose not to pursue those alternatives in a moot case, but rather bring the lack of a justiciable controversy to the attention of the Court of Appeals, should not, as Plaintiff suggests, work to Mutual's detriment.

CONCLUSION

If events progress such that Plaintiff seeks to participate in a particular clinical trial of HDC-ABMT, and Mutual denies coverage for that particular procedure, a

justiciable controversy would then arise which could be the subject of a new lawsuit premised upon those facts. Plaintiff cannot dispute that those circumstances do not currently exist, and more importantly did not exist at the time of the Eleventh's Circuit's opinion. This Court should exercise its discretion, and utilize its inherent supervisory powers over lower federal courts, to correct the Eleventh Circuit's erroneous assertion of jurisdiction over a moot controversy. Mutual respectfully requests that its Petition for Certiorari be granted, the opinions below on the propriety of injunctive relief vacated, and the appeal dismissed.

Respectfully submitted,

MUTUAL OF OMAHA LIFE INSURANCE COMPANY,
Petitioner

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October, 1993.

APPENDIX

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Order of the District Court Denying Plaintiff's Motion for Rehearing of the District Court's Order Granting Defendant's Motion to Dismiss A1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

MARY P. DAHL-EIMERS,

Plaintiff,

v.

MUTUAL OF OMAHA LIFE INSURANCE COMPANY,

Defendant.

_____/

Case No. 92-30254-RV

(Filed Oct. 15, 1993)

ORDER

Pending is the Plaintiff's motion for rehearing. (Doc. 89). For the reasons set forth herein, the relief requested is DENIED.

By order of September 21, 1993 (doc. 88), I granted the defendant's motion to dismiss, finding that this matter no longer presented a justiciable case or controversy. Among the circumstances which figured in that decision was the fact that the Plaintiff, Mary P. Dahl-Eimers, was experiencing a remission of the symptoms of her cancer. The motion for rehearing calls attention to an affidavit of Dahl-Eimers (doc. 87) which bears a file-stamp date of September 14, 1993. The affidavit was not, however, in the file during the time the motion to dismiss was under advisement, nor was it in the file when I entered the order of September 21, 1993. Thus, I did not have any opportunity to consider her affidavit with regard to the order of dismissal.

Dahl-Eimers states in her affidavit that "significant active cancer in my liver" was detected in August 1993. In response to the presence of cancer in her liver, she is again being treated with Taxol. It is Dahl-Eimers' understanding that the Taxol treatments will continue for three to five months, depending upon her response. After the completion of the Taxol treatments, Dahl-Eimers intends to seek HDC-ABMT therapy "at a cancer center in the United States."

These facts do not change my conclusion that this matter is, at this point, non-justiciable. The fact remains that Dahl-Eimers is not presently seeking to undergo HDC-ABMT; that decision lies in the future. It cannot be predicted at this time which HDC-ABMT procedure Dahl-Eimers might seek to undergo, if, indeed, she qualifies for any such treatment, much less whether Mutual of Omaha might deny coverage for that particular treatment. Dahl-Eimers concedes these contingencies, but continues to insist that this court issue a broad declaratory judgment that HDC-ABMT is not considered experimental. Indeed, the majority of Dahl-Eimers' memorandum is devoted to the argument that it is error for me not to rule so broadly.

I rejected that argument earlier and I reject it again now. Courts are established to adjudicate disputes between parties who have taken adverse positions on discrete, live controversies. This court does not sit as a medical review board, but, instead, as a court of limited jurisdiction. For that reason, as I stated in my earlier order, the appropriate inquiry under these circumstances must be fact specific: whether the particular treatment which a specific patient desires is or is not covered by the

controlling language of the insurance policy. That question is not now presented for adjudication in this matter. If at some point Dahl-Eimers stands ready to undergo a particular HDC-ABMT procedure, and Mutual of Omaha denies coverage for that procedure, then a justiciable controversy would exist. No such controversy exists at this time.

Accordingly, the motion for rehearing is DENIED.

DONE AND ORDERED this 15th day of October, 1993.

/s/ Roger Vinson
ROGER VINSON
United States District Judge